IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1490

NOEL DOORBAL

Petitioner

v.

JAMES R. Mc DONOUGH
Secretary, Florida Department of Corrections

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, NOEL DOORBAL ("Doorbal") was the defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. Respondent, STATE OF FLORIDA, "the State" was the plaintiff. The following symbols and citations will be used to designate references to the transcript and record in this instant cause:

Trial Transcripts - (T. page) [1]

Record on Direct Appeal to this Court - (R. page)[2]

Post Conviction Record on Appeal - (PC-R. page)[3]

Supplemental Post Conviction Record on Appeal - (PC-SR. page)[4]

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[1]The Trial Transcript consists of 14,523 pages in 177 Volumes. Appellant requested that the Clerk provide this Court with 3 CD's filed in the Circuit Court that contain these Volumes as well as the Supplemental ROA and the Exhibits in this cause (PC-R. 586). The Supplemental ROA consists of 1,174 pages in 7 Volumes. The Exhibits consist of 10,690 pages in 53 Volumes.

[2] The ROA consists of 3,956 pages in 20 Volumes.

[3] The Post Conviction ROA consists of 1,206 pages in 7 Volumes.

[4] The Post Conviction Supp. ROA consists of 443 pages in 3 Volumes.

INTRODUCTION

Significant errors in Doorbal's capital murder trial and sentencing were never presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. A review of the issues appellate counsel neglected demonstrates deficient performance which prejudiced Doorbal because, but for such insufficiencies, there remains a reasonable probability the result of Doorbal's direct appeal would have been different. As "extant legal principles . . . provided a clear basis for . . . compelling appellate argument," Fitzpatrick v.Wainwright, 490 So.2d 938, 940 (Fla. 1986), neglecting to raise these fundamental issues fell "far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and in concert, Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984), the omitted appellate issues demonstrate "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165.

Appellate counsel's failure to provide constitutionally effective assistance of counsel on direct criminal appeal of Doorbal's Judgments of Conviction and Sentences of Death in the following regards constitutes ineffective assistance of appellate counsel under the Strickland standard. Strickland v. Washington, 466 U.S. 668 (1984); Wilson v. Wainwright, 474 So 2d 1162, 1163 (Fla. 1985); Freeman v.

State, 761 So. 2d 1055, 1069 (Fla. 2000); Suarez v. Dugger, 527 So. 2d 190 (Fla. 1998); Randolph v. Florida, 853 So. 2d 1051 (Fla. 2003).

Following a review of the facts adduced at Doorbal's jury trial and an examination of the errors committed and preserved for appeal at each stage of the proceedings in the trial court, this Petition will demonstrate that Doorbal's appellate counsel's failure to raise or discuss those preserved errors on direct criminal appeal of Doorbal's Judgments of Conviction and Sentences of Death constituted a substantial denial of the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States of America, as well as Article 1, Section 12 of the Florida Constitution, requiring that Doorbal be granted a new jury trial and/or penalty phase proceeding.

JURISDICTION

This is a petition under Fla.R.App.P. 9.l00(a) and Art. I, § 13, Fla. Const. Article 1, Section 13 of the Florida Constitution provides: "The Writ of Habeas Corpus shall be grantable of right, fully and without cost." This Court has jurisdiction. Fla.R.App.P. 9.030(a)(3); Art. V, § 3(b)(9), Fla. Const.

Doorbal raises constitutional issues concerning the appellate process upon his conviction and sentence of death. Jurisdiction lies in this Court, Smith v. State, 400 So.2d 956, 960 (Fla. 1981), as the fundamental constitutional errors complained of

arose in a capital case wherein this Court heard and decided the direct appeal. Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969). Habeas corpus is the proper remedy. *See, e.g.,* Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987).

This Court also has inherent power to do justice. The ends of justice urge the Court to correct the fundamental constitutional errors herein. Dallas v.Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

REQUEST FOR ORAL ARGUMENT

Doorbal has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to address the issues through oral argument is appropriate in this case, given the seriousness of the claims involved. Doorbal, through undersigned counsel, respectfully requests that the Court permit oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered the judgments of conviction and sentences under review. (R. 2856-58, 3662-68). Doorbal was indicted on October 2, 1996, for conspiracy to commit racketeering, racketeering, two counts of first degree murder involving Frank Griga and Krisztina Furton, three counts of kidnapping, two counts of attempted

extortion, two counts of grand theft, attempted first degree murder of Marcelo Schiller, armed robbery, burglary of a dwelling, arson, extortion and conspiracy to commit a first degree felony. (R. 61-112). Doorbal was tried by jury from February 2, 1998 to May 5, 1998, before Judge Alex Ferrer. (T. 2411-16397).

The jury found Doorbal guilty on all counts, (T. 13680-13685), and the Court adjudicated Doorbal guilty on May 5, 1998. (T. 13695). Doorbal's penalty phase was conducted from June 1, 1998, to June 2, 1998, (T. 14380-14423), and on June 11, the jury's verdict was announced. (T. 14311-14314). The jury recommended two sentences of death with each advisory recommendation vote as 8-4. (T. 14311-14314). The trial Court, following a Spencer hearing held on July 8, 1998, (T. 14320-14376), sentenced Doorbal on July 17, 1998. (T. 14380-14423).

Doorbal was sentenced to death for his conviction in the first degree murder of Frank Griga, was consecutively sentenced to death for the conviction in the first degree murder of Krisztina Furton, was consecutively sentenced to: thirty years in prison for conspiracy to commit racketeering, to thirty years in prison for racketeering, to life in prison for the kidnapping of Ms. Furton, to life in prison for the kidnapping of Mr. Griga, to five years in prison for one count of attempted extortion, to five years in prison for grand theft auto, to life in prison for attempted first degree murder of Mr. Schiller, to life in prison with a three year mandatory for

kidnapping with use of a firearm, to life in prison with a three year mandatory for robbery with use of a firearm, to fifteen years in prison for burglary of a dwelling, to fifteen years in prison for grand theft in an amount of $20,000 or more but under $100,000, to thirty years in prison for first degree arson, to thirty years in prison for extortion with a firearm and to fifteen years in prison for conspiracy to commit first degree murder. (T. 14420).

Doorbal's Motion for New Trial was filed on July 27, 1998. (R. 3495-3499). A Notice of Appeal was filed on August 12, 1998. (R. 3659). On November 2, 1998, a Motion to Remand for an Evidentiary Hearing pending a Motion for New Trial based on Newly Discovered Evidence was filed in the Florida Supreme Court and the State filed its Response on December 17, 1998. (PC-R. 399-402, 404-411). Upon remand to the trial court, Doorbal's Motion for a Richardson hearing and for a New Trial was denied following a hearing held on January 13, 1999. (T. 3912-3954). A Notice of Appeal was filed on January 13, 1999. (R. 3781).

On Direct Appeal, Doorbal's Appellant counsel raised the following claims that were disposed of by this Court:

I. Doorbal was denied a fair trial when the State improperly elicited irrelevant testimony relating to "bad character" evidence at a time when Doorbal had not placed his character as an issue. The Florida Supreme Court, forced to

analyze the testimony under the "fundamental error doctrine" because trial counsel failed to contemporaneously object to any of the highly prejudicial statements, determined that relief was not warranted based on fundamental error.

II. Doorbal was denied a fair trial when the State commented in its closing argument upon Doorbal's decision to exercise his right to remain silent. The Florida Supreme Court, forced to review this reversible error under the "fundamental error doctrine" because trial counsel failed to contemporaneously object or motion for a mistrial, determined that relief was not warranted based on fundamental error but noted its position regarding this form of prosecutorial misconduct.

III. Doorbal was denied a fair trial when the State improperly used the "Golden Rule" argument to the jury during the guilt phase of the trial. The Florida Supreme Court, forced to review the reversible error under the "fundamental error doctrine" because trial counsel failed to contemporaneously object, determined that the State committed error, "walking the edge of reversible error," that needlessly violated the prohibition against "Golden Rule" arguments, but did not warrant relief based on fundamental error.

IV. Doorbal was denied a fair trial when the Court denied a motion to suppress illegally seized evidence used at trial. The Florida Supreme Court concluded that a "common sense" determination that there was a probability of evidence related to crimes and the denial of the motion did not entitle Doorbal to relief.

V. Doorbal was denied a fair trial when the Court limited the presentation of mitigating evidence. The Florida Supreme Court concluded that if there was any error committed by the Court in not admitting letters from co-defendant Dan Lugo as mitigating evidence showing that Lugo had a dominating influence over Doorbal "in the context in which it was proffered," such error was harmless and Doorbal was not entitled to relief.

VI. Doorbal was denied a fair trial when the State improperly used the "Golden Rule" argument to the jury during the penalty phase of the trial and when the State implored the jury to show Doorbal no mercy. The Florida Supreme Court, forced to review the reversible error under the "fundamental error doctrine" because trial counsel failed to contemporaneously object, determined that the State committed error while treading dangerous ground, but did not warrant relief based on fundamental error.

VII. Doorbal was denied a fair trial when the Court improperly considered and weighed the use of felony murder and pecuniary gain aggravating circumstances. The Florida Supreme Court ruled that improper doubling did not occur and Doorbal was not entitled to relief on this issue.

VIII. Doorbal was denied a fair trial when the Court improperly considered and weighed the use of cold, calculated and premeditated and avoiding arrest aggravating circumstances. The Florida Supreme Court ruled that improper doubling did not occur, denying relief on this issue.

IX. Doorbal was denied a fair trial when the Court found that the cold, calculating and premeditated aggravating circumstance exists due to insufficient evidence. The Florida Supreme Court denied relief for Doorbal.

X. Doorbal was denied a fair trial when the Court found that the avoiding arrest aggravating circumstance exists due to insufficient evidence. The Florida Supreme Court concluded that Doorbal's claim does not warrant relief.

XI. Doorbal, on rehearing, challenged Florida's capital sentencing scheme as unconstitutional in lieu of Ring v. Arizona, 122 S. Ct. 2428 (2002).

The Florida Supreme Court rejected the argument and denied Doorbal relief.In addition, although not specifically challenged, the Florida Supreme Court reviewed the proportionality of Doorbal's sentences to death and concluded Doorbal was not entitled to relief on this issue.

The Florida Supreme Court affirmed Doorbal's convictions and sentences, including his sentences of death, but withdrew its opinion. Doorbal v. State, 2002 WL 31259825, 27 Fl. Law Weekly S839 (Fla. Oct. 10, 2002). Upon Rehearing, the Florida Supreme Court superceded its opinion and denied Doorbal relief. Doorbal v. State, 837 So.2nd 940, 28 Fla. Law Weekly S108 (Fla. Jan 30, 2003) (NO. SC93988). The U.S. Supreme Court denied Certiorari on June 27, 2003.

Doorbal v. Florida, 123 S.Ct. 2647, 156 L.Ed.2d 663, 71 USLW 3799 (U.S. Fla. June 27, 2003) (NO. 02-10379).

Pursuant to Fla.R.Crim.P. 3.850 *et seq*., Doorbal subsequently filed Motions To Vacate Judgments Of Convictions And Sentences Of Death, Motions To Compel Discovery, a Special Request Motion For Leave To Amend, and Motions For an Evidentiary Hearing along with attachments in Miami-Dade Circuit Court on June 15, 2004 and on January 15, 2005. (PC-R. 177-479, PC-SR. 95-200). On post-conviction, Doorbal also filed a Motion to Disqualify Judge Ferrer, (PC-SR. 7-19), a Motion to Depose the Assistant State Attorneys, (PC-R. 480-482), Motions for a Continuance (PC-R. 673-674), and Demands for Additional Public Records, (PC-R. 156-159, 163-167, 508-511) - all of which were denied by the trial Court. (PC-R. 92, 94, 902, 1156). Without holding an evidentiary hearing, Circuit Court Judge Alex Ferrer denied Doorbal's Rule 3 Motion on February 24, 2005. (PC-R. 782-784). Doorbal filed a Notice of Appeal on the Motion to Vacate Judgments and Sentences of Death on February 25, 2005. (PC-R. 786).

STATEMENT OF THE FACTS

The facts relevant to Doorbal's claims for habeas corpus relief are set forth in the individual claims below.

GROUNDS FOR RELIEF

Doorbal's Record on Appeal is replete with preserved error that Doorbal's Appellant Counsel neglected to raise on Direct Appeal. This Petition for Writ of Habeas Corpus follows.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN DENYING A MOTION TO CONTINUE SENTENCING AND RELIEF ON THE BRADY ISSUES ADDRESSED THROUGHOUT DOORBAL'S TRIAL, PARTICULARLY FOLLOWING SCHILLER'S PRE-ARRANGED ARREST ON THE COURTHOUSE STEPS.

Prior to trial, Doorbal's defense counsel repeatedly requested *Brady* material and other items of discovery be provided in preparation for trial, giving the State an opportunity to fulfill their duty to disclose any information or evidence that the State had in their possession which could serve as exculpatory or impeaching evidence for Doorbal. Though Assistant State Attorney Gail Levine denied knowledge of Schiller's complicity in the Medicaid scheme (T. 13064), an email communication between Levine and her supervisor Michael Band dated October 31, 1996, evidences Levine had actual and specific knowledge of the Medicare fraud investigation as well as material evidence of guilt that she withheld from Doorbal. (PC-R. 334). Levine not only knew that the Federal Government intended to indict Schiller for

Medicare fraud with evidence she provided the Government, she conceded that she used Doorbal's Spencer hearing as a ruse to entice Schiller to travel from South America to Miami to testify so that he could be arrested on the courthouse steps after the hearing. (PC-R. 895).

On July 14, 1998, following the arrest of Mr. Schiller on July 8, 1998, the trial court conducted a telephonic hearing and denied Mr. Doorbal's Motion to Continue the Sentencing in order to give Mr. Doorbal an opportunity to conduct an investigation into whether the State committed a Brady violation. (R. 3511).

The trial court denied defense motions for new trial and to conduct discovery, stating that, even assuming the State committed a discovery violation, it was unintentional and did not prejudice Doorbal "in any way shape or form." (R. 3952). Not only must a defendant prove that the State possessed favorable impeachment evidence, but he must also prove that the State willfully or inadvertently suppressed that evidence. Brady, 373 U.S. at 87. Kyles and its progeny no longer place a "due diligence" requirement on defense counsel to attempt to discover the suppressed material. Rather, these significant cases "squarely place the burden on the State to disclose to Doorbal all information in its possession that is exculpatory." Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001) (emphasis added). *See also* Allen v. State, 854 So. 2d 1255, 1259 (Fla. 2001) ("The defendant's duty to exercise due diligence

in reviewing Brady material applies only after the State discloses [its existence]."). Although the trial court repeatedly stated that the defense must show some evidence that the State had intentionally violated Doorbal's right to full discovery. The State's suppression of the evidence undermines confidence in the outcome.

It is the third requirement for a *Brady* claim that demonstrates ineffective assistance of appellate counsel when this claim was not raised in Doorbal's Direct Appeal. Brady, 373 U.S. at 87. The Court erred in denying Doorbal's Motion for further discovery when the State refused to provide Doorbal with evidence that could have been used to impeach the credibility of Schiller, a crucial witness, according to the trial court. The State's failure established prejudice and materiality. As stressed in Kyles, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." 519 U.S. 434. In fact, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. Further, Kyles stressed that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434-35. Rather, a defendant need only show that "the favorable

evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

Finally, in determining materiality, suppressed evidence must be "considered collectively, not item by item." Id. at 436. In the present case, the fact Schiller was involved in a Medicaid Fraud scheme in violation of the Fraud and RICO statutes would have shown jurors Schiller was capable of committing crimes and making false representations. This type of impeachment material was at the heart of the Supreme Court's reversal in Kyles v. Whitley. In Kyles, an informant named Beanie called the police to report that he had bought a car from Kyles and feared that it belonged to Kyles' victim. 514 U.S. at 424. Beanie thereafter provided information linking Kyles to the car owner's murder. By the State's own admission, Beanie was essential to its investigation. Id. at 445. The police failed to disclose, however, among other things, that Beanie was being prosecuted for theft and was a primary suspect in a similar robbery/murder. Beanie later confessed his involvement in the similar murder, but was never charged in connection with it. Id. at 422 n.13.

Unquestionably, the prosecution at bar possessed favorable impeachment evidence concerning the Medicaid Fraud and RICO investigations, and the impending federal Indictment of Schiller. Equally without doubt, the State failed to inform Doorbal's defense counsel about the existence of the Medicaid Fraud and

RICO investigations and the status of Schiller's impending prosecutions. Had evidence of Schiller's complicity in the Medicaid Fraud and RICO ring been revealed to Doorbal's jury (as urged by the rules of evidence, extant case authority and Doorbal's defense), this damning evidence would have supported a finding–in harmony with the defense theory and consistent with the physical evidence and live testimony–that Schiller lacked credibility as a witness and was testifying as he had based on an ulterior motive and purpose wholly concealed from jurors deciding Doorbal's guilt or innocence--and/or his fate in the penalty phase.

Clearly, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. *See also* Banks v. Dretke, 540 U.S. 668 (2004) ("On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the [status of the key witness as a paid informant] been disclosed to the defense."); Giglio v. U.S., 405 U.S. 150, 154-55 (1972) (As the government's case relied on witness' testimony, his credibility as a witness was an important issue in the case, and evidence of any present or future prosecution would be relevant to his credibility as the jury was entitled to know of it); Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002) (same); Hoffman v. State, 800 So. 2d 174, 179-81 (Fla. 2001) (same); State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (same);

Rogers v. State, 782 So. 2d 373 (Fla. 2001) (same). *See also* Floyd v. State, 902 So.2d 775 (Fla. 2005) (granting new trial based on Brady violations); Mordenti, 894 So. 2d 161 (Fla. 2004) (same). Doorbal, too, is therefore entitled to a new trial.

Appellate counsel's failure to raise or discuss this error on direct appeal was a serious deficiency measurably below objective standards of reasonably effective representation of a defendant in a capital case. But for appellate counsel's failure to challenge the trial court's denial of Doorbal's motions under Brady, there remains a reasonable probability of reversal as jurors would have reasonably rejected and disregarded Schiller's testimony. The omitted material therefore "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN DENYING DEFENSE MOTIONS FOR CONTINUANCE WHEN TRIAL COUNSEL'S FATHER DIED AND HIS MOTHER WAS STILL IN THE HOSPITAL WHEN DOORBAL'S TRIAL BEGAN.

Doorbal's appellate counsel failed to raise or discuss the fact that the trial court had denied defense motions for continuance despite the illness of trial counsel's parents and the death of defense counsel's father just prior to the start of

trial. The law is clear, however, that failing to raise such an issue, where warranted, may constitute ineffective assistance of counsel. *See, e.g.*, Williams v. Singletary, 765 So.2d 107 (Fla. 2nd DCA 2000). (Appellate counsel's failure to raise denial of motion for continuance on direct appeal prejudiced defendant, and thus amounted to ineffective assistance).

In filling-in for trial counsel, Penny Burke, Esquire, who was not qualified to serve as co-counsel on a death penalty case, informed the trial court that: "Mr. Natale's father had a heart attack last week. Both parents are presently hospitalized. The mother had a heart attack and father is in the hospital as well." (R. 1862). She later referred to "Mr. Natale's father who is on, I think, his death bed now." (R. 2142). Though the trial court declined to excuse Natale for purposes of trial, his motion to withdraw for appellate purposes was granted after the termination of the trial. (R. 14506-14507). Notwithstanding the trial court's earlier refusal to allow Natale to withdraw as trial counsel, Mr. Gutierrez, who had been appointed for purposes of appeal, was allowed to withdraw due to a family illness, with the trial court stating it would find a replacement.

Trial counsel's loyalty to the defense was clearly burdened by a conflict that interfered with counsel's ability to fairly represent Doorbal, denying him his right to

effective counsel guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 16(a) of the Constitution of the State of Florida.

A criminal defendant is deprived of the Sixth Amendment right to counsel where: (i) defense counsel is faced with an actual conflict of interest, and (ii) that conflict has "adversely affected" defense counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), *cert. denied*, 488 U.S. 958 (1988).

The conflict at bar arose between: (a) counsel's preoccupation with the impending death of his closest family members, and (b) any fear counsel might have had that Doorbal would be denied a fair trial. Counsel's loyalty was thus reasonably divided between duty to his dying parents and, on the one hand, and preserving Doorbal's right to a fair trial, on the other.

As the right to appointed criminal defense counsel's wholly undivided loyalty "is among those `constitutional rights so basic to a fair trial, . . . [its] infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (citing Chapman v.California, 386 U.S. 18, 23 (1967)). Trial counsel has an actual conflict of interest where he "owes duties to a party whose interests are

adverse to those of the defendant." Zuck v.Alabama, 588 F.2d 436, 439 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979).

In United States v. Tatum, 943 F.2d 370, 375 (4th Cir.1991), for example, the court noted the overlapping nature of the "actual conflict" and "adverse effect" prongs of the Sixth Amendment analysis:

> [Counsel's] representation of conflicting interests . . . is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other.

United States v. Tatum, 943 F.2d at 376 (emphasis added).

At bar, Doorbal's trial counsel was so preoccupied by the failing heath of both of his parents that he omitted to take action on behalf of his client in such a way that ultimately operated to his clients's detriment. Doorbal's trial counsel served one master (his late parent) to the other's (Doorbal's) detriment–denying Doorbal his right to counsel with unfettered loyalty, as guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 16(a), Florida Constitution.

The United States Supreme Court has recognized, moreover, that "in certain Sixth Amendment contexts, prejudice is presumed. . . . Prejudice, in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Strickland v. Washington, 466 U.S. 668, 692 (1984). Under this standard, the conflict is subjected to a "similar, though more limited, presumption of prejudice" than a *per se* presumption. Strickland, 466 U.S. 692. Under Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), prejudice is presumed if Doorbal shows counsel: (1) "actively represented conflicting interests," and (2) the "actual conflict of interest affected his lawyer's performance." Id.

Counsel's failure to perform reflected an adverse interest and effect, comprising a conflict of interest under Cuyler v. Sullivan, and requiring its presumption of prejudice. Even were Doorbal required to show prejudice, however, the record is rife with examples of it (detailed in Doorbal Rule 3.850 Motion) inhering in the trial court decision not to allow Natale to withdraw as trial counsel.

For the foregoing reasons, appellate counsel's failure to raise or discuss the trial court's refusal to allow defense counsel to withdraw in light of trial counsel's overwhelming family tragedy undermined the reliability of the direct appellate outcome, denying Doorbal a fair appeal with the effective assistance of counsel

guaranteed by the Sixth and Amendment to the United States Constitution, and Article I, Section 16(a) of the Florida Constitution.

Thus, Doorbal's appointed appellate counsel's omission to raise or discuss these errors on direct appeal fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal prosecution wherein the defendant faced death. But for appellate counsel's failure to raise or discuss these matters, there remains a reasonable probability the outcome of the appeal would have been different as there remains a reasonable probability the Court would have entertained Doorbal's arguments, applied the cited authorities and reversed and remanded for a new penalty phase proceeding.

Mr. Natale requested that the trial Court allow him 30 days to attend to significant family matters after his father died on the eve of Doorbal's trial. The trial court's Order denying the defense motion for a continuance is not supported by competent substantial evidence. The trial Court allow two weeks for Mr. Natale to bury his father and address family business. Mr. Natale, who intends to testify at an evidentiary hearing on an ineffective assistance of counsel claim and state that he was so grief stricken that he does not even remember most of the trial – evidenced by his failure to preserve significant appellate issues and his absence at most of Doorbal's pretrial hearings.

Doorbal's appellate counsel was ineffective in failing to raise and discuss this error on direct appeal. Appellate counsel's failure to raise or discuss this error on direct appeal constituted a serious deficiency falling measurably below objective standards of an attorney's reasonably effective representation of a defendant in a capital case.

But for appellate counsel's failure to challenge the trial court's ruling on the defense motion to continue the trial date, there remains a reasonable probability the outcome would have been different.

There remains a reasonable probability the case would have been reversed and remanded for a new trial if raised on direct appeal as Doorbal had been denied a fair trial with an opportunity to properly prepare and obtain competent representation of an attorney who was not, throughout Doorbal's trial, experiencing inconsolable grief. The trial Court abused its discretion in denying Doorbal's Motion for a Continuance.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN DENYING GUILT PHASE COUNSEL'S MOTIONS TO WITHDRAW.

For the same reasons in Ground II (failure to challenge denial of continuance) Doorbal was denied the effective assistance of appellate counsel guaranteed by the

Sixth Amendment when appointed appellate counsel failed to raise or discuss the trial court's erroneous refusal to allow defense counsel to withdraw numerous times despite serious personal difficulties, financial hardship and including the recent illness and death of his father.

A criminal defendant is deprived of the Sixth Amendment right to counsel where: (i) defense counsel is faced with an actual conflict of interest, and (ii) that conflict has "adversely affected" defense counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), *cert. denied*, 488 U.S. 958 (1988) (same). Doorbal's defense counsel was exeriencing personal difficulties which clearly interfered with his representation of Doorbal, creating a conflict of interest, and the trial court's refusal to allow his withdrawal should have been raised as error on direct appeal.

Appellate counsel's failure to raise or discuss this error on direct appeal– particularly significant in light of the fact that the trial court had previously refused to grant a continuance in which for counsel to attend to these matters–constituted a serious deficiency measurably below objective standards of reasonably effective representation of a defendant in a capital case.

But for appellate counsel's failure to raise or discuss on direct appeal the trial court's refusal to allow defense counsel to withdraw, there remains a reasonable probability the case would have been reversed and remanded on direct criminal appeal as Doorbal had a constitutional right to adequate counsel.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S ERROR IN DENYING THE DEFENSE MOTIONS TO SEVER CO-DEFENDANTS FOR TRIAL.

Doorbal's Appellate Counsel failed to appeal the trial court's denial of Doorbal's motion to sever co-defendants. In denying Doorbal's motion to sever, the trial court ruled that it would give the jury limiting instructions when the time came.

The defense asserted joinder of defendants and offenses was improper and moved to sever. (R. 764). Defense counsel argued the law required Schiller counts be severed from the RICO, and that Griga counts be severed from Schiller counts and the RICO. The State posited that it could charge RICO as long as it could conceivably be proven. (T. 12416). Defense counsel responded by requesting acquittal on the RICO count as to Doorbal as there was insufficient evidence to support a RICO conviction. (Id.). Appellate Counsel never raised or discussed the trial court refusal to sever.

In McCray v. State, 416 So.2d 804 (Fla. 1982), this Court set forth the general principles of joinder and severance, noting that a trial court should order severance whenever necessary to promote a fair determination of the guilt or innocence of one or more defendants. Id. at 806 (citing Rule 3.152(b), Florida Rules of Criminal Procedure). This Court recognized that a fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct and statements and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. Id. *See also* Johnson v. State, 720 So.2d 232, 236 (Fla. 1998).

In deciding that a motion for severance is a discretionary matter, Florida courts have nevertheless recognized that severance should be liberally granted whenever a potential prejudice is likely to arise in the course of trial. Menendez v. State, 368 So.2d 1278 (Fla. 1979). "The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency and convenience." Crum v. State, 398 So.2d 810 (Fla. 1981).

Rule 3.152(b)(1)(i), Fla.R.Crim.P., provides for severance before trial:

> [U]pon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants.

When joinder of defendants causes an actual or threatened deprivation of the right to a fair trial, moreover, severance is no longer discretionary. United States v. Bovd, 595 F.2d 120 (3d Ci1978); Baker v. United States, 329 F.2d 786 (10th Ci1964). In such circumstances, severance becomes mandatory.

The evidence at trial showed that Doorbal was a peripheral character in the present case. He was a hanger-on, servant or follower who, to one extent or another (depending on which of the defendants' theories one believes) became somehow involved in this very serious criminal case. Doorbal's association in the mind of the jurors with the remaining characters was extremely prejudicial, reasonably leading the jury to believe that Doorbal was similar to or of comparable responsibility as his co-defendants.

Thus, Doorbal's appellate counsel's omission to raise this error on direct appeal fell measurably below objective standards of reasonably effective assistance of counsel in a criminal appeal where an accused faces death. But for counsel's failure to raise this issue on appeal, there remains a reasonable probability the case would have resulted in reversal as the joinder of these co-defendants was prejudicial.

This is particularly true in light of the fact that Doorbal exercised relatively little decision-making power among the group of codefendants and was more the follower than a leader, in contrast with Lugo. Trying Doorbal jointly with Lugo tended to reinforce the idea that Doorbal's conduct was on the same par and that he acted with the same level of premeditation, coldness, calculation and focus on pecuniary gain. Severance was essential and only "appropriate to promot[ing] a fair determination of [Doorbal's] guilt or innocence." Rule 3.152(b)(1)(i), Fla.R.Crim.P. Appellate counsel was remiss to overlook the trial court's reversible error.

CLAIM V

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S ERROR IN DENYING THE DEFENSE MOTIONS TO SEVER COUNTS OF THE INDICTMENT.

The defense asserted joinder of the RICO offenses was improper and moved to sever (R. 764), arguing the law required the RICO counts to be severed. The State posited that it could charge RICO as long as a RICO could be proven as to a co-defendant. (T. 12416). Though the trial court denied the motion to sever offenses, Appellate Counsel never raised or discussed the denial of severance.

The purpose of separate trials is "to assure that evidence adduced on one charge will not be misused to dispel doubts on the other." State v. Williams, 453

So.2d 824, 825 (Fla. 1984) (internal quotation marks omitted), *adopted*, Paul v. State, 385 So.2d 1371, 1372 (Fla. 1980)). In order for joinder of Doorbal's offenses to have been proper, his offenses would have to have been connected in a "significant way." Ellis v. State, 622 So.2d 991, 1000 (Fla. 1993).

The Court also analyzed its decision in Bundy v. State, 455 So.2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S.Ct. 1958 (1986), where the defendant first attacked four women, killing two, in a Florida State University sorority house. Roughly an hour later, Bundy attacked a fifth woman in an apartment house several blocks away. Id. at 334-35. In Bundy, the Court found "the criminal acts [were] connected by the close proximity in time and location, by their nature, and by the manner in which they were perpetrated." Id. at 345. The Court later characterized Bundy's crimes as "a classic example of an uninterrupted crime spree in which no significant period of respite separated the multiple crimes." Ellis, 622 So.2d at 999.

In Fotopoulos v. State, 608 So.2d 784 (Fla.1992), cert. denied, 508 U.S. 924, 113 S.Ct. 2377 (1993), the defendant induced a woman to murder a man while he videotaped the shooting. He then used the video to blackmail the woman into hiring a hit man to murder his wife a month later. This Court found that since one crime induced the other crime, a sufficient causal link existed to permit joinder. Id. at 790.

From this Court's review of those cases, the Court concluded:

> First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, Bundy, or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. Fotopoulos. But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. Crossley.

Ellis, 622 So.2d at 1000. With those rules in mind, this Court now "must consider where on the spectrum [this case] falls." Id.

"For 'crime spree' offenses to be tried together, they generally require both temporal and geographical proximity, as well as a similarity between the offenses." Hutchinson v. State, 731 So.2d 812, 815 (Fla. 5th DCA 1999). Here, it is only remotely arguable that the two crimes were connected temporally and/or geographically. Even assuming they were so connected, "temporal and geographic proximity is not sufficient in itself to justify joinder." Ellis, 622 So.2d at 1000. In this case, the third requirement for a crime spree is not satisfied as there is not a similarity between the two offenses.

The question of whether severance should be granted must, however, necessarily be answered on a case by case basis. Clarington v. State, 636 So. 2d 860 (Fla. 3rd DCA 1994). In ruling on a motion for severance, the trial court should

accord the objective of fairly determining the innocence or guilt of a defendant priority over other relevant considerations such as expense, efficiency, and convenience. Green v. State, 408 So. 2d 1086 (Fla. 4th DCA 1982).

When joinder of offenses causes an actual or threatened deprivation of the right to a fair trial, moreover, severance is no longer discretionary. United States v. Boyd, 595 F.2d 120 (3d Ci1978); Baker v. United States, 329 F.2d 786 (10th Cir. 1964). In such circumstances, severance becomes mandatory.

In the present case, it was unfairly prejudicial to the defense of the murder cases to have them joined with the Schiller kidnapping. While it is difficult to show a temporal or geographical connection between the two sets of offenses, it is near impossible to show a similarity.

While it is therefore hard to connect the two sets of events, it is rather easy to show how the introduction of evidence from the Schiller case clearly prejudiced the defense in the murder prosecution, and *vice versa*.

The case law dealing with the admissibility of collateral crime evidence is analogously fraught with examples of injustice wrought by the mixing of apples with oranges to turn one into the other in the minds of the jury. *See e.g.*, Long v. State, 610 So.2d 1276, 1280-1281 (Fla.1992) (although evidence connected with

defendant's arrest in collateral crime was admissible to establish identity and connect him to victim of charged offense, details of collateral crime were not admissible).

Indeed, even when evidence of a collateral crime is properly admissible in a criminal case, this Court has sternly cautioned that "the prosecution should not go too far in introducing evidence of other crimes.

The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident." Randolph v. State, 463 So.2d 186, 189 (Fla. 1984).

Unlike Lugo and the others involved in the two sets of incidents, Doorbal was a follower who did not participate in a common scheme of targeting wealthy people for kidnapping, extortion and attempted murder.

In the present case, all of the evidence concerning the Schiller kidnapping–wherein a live victim recounted atrocities allegedly inflicted by a group with whom Doorbal had been associated–was mixed into the trial of the Griga and Furton murder counts–wherein evidence of otherwise wholly unconnected acts were attributed also to the accused. Because of the shear bulk of the evidence and detailed nature of the live victim testimony in the trial of the Schiller counts, it can easily be said that the trial of the Schiller kidnapping counts became a feature of the Griga and Furton murder counts--and *vice versa*–all to Defendant Doorbal's unfair prejudice.

Doorbal's appellate counsel's omission to raise or discuss this error on direct appeal fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal case wherein the defendant faces death.

But for appointed appellate counsel's omission to raise or discuss on direct appeal the trial court's error in refusing to sever these counts of the Indictment, there remains a reasonable probability jurors would have acquitted Doorbal of the murder counts, or acquitted Doorbal of the Schiller counts, the latter of which were also used as aggravating facts in imposing the death penalty.

CLAIM VI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN DENYING THE DEFENSE MOTION FOR A NEW TRIAL.

Though the trial court denied Doorbal's Motions for New Trial and to conduct discovery based on the State's discovery violation concerning Schiller's involvement in, and impending charges for, Medicaid Fraud, ruling that it did not prejudice the defense "in any way shape or form" (R. 3952), Doorbal's appellate counsel never raised or discussed the denial of those Motions for New Trial on direct appeal.

Had the clearly available evidence concerning Schiller's complicity in the Medicaid Fraud and RICO operations been properly revealed to the jury in Doorbal's case, however, Schiller would have wholly lacked credibility as a witness.

Schiller was testifying with an ulterior motive, intent and purpose wholly concealed from jurors deciding Doorbal's guilt or innocence, as well as his ultimate fate in the course of the penalty phase proceedings.

Such evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. *See also* Giglio v. United States, 405 U.S. 150, 154-55 (1972) (Where the government's case relies on a witness' testimony in a criminal case, the witness' credibility becomes an important issue in the case, and evidence of any present or criminal future prosecution of the witness would be relevant to his or her credibility as the jury was entitled to know of it); Banks v. Dretke, 540 U.S. 668 (2004) (similar circumstances where the witness is a paid informant); Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002) (similar); Hoffman v. State, 800 So. 2d 174, 179-81 (Fla. 2001) (similar); State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (similar); Rogers v. State, 782 So. 2d 373 (Fla. 2001) (similar); Floyd v. State, 902 So.2d 775 (Fla. 2005) (granting a new trial based on the State's Brady violations); Mordenti, 894 So. 2d 161 (Fla. 2004) (same).

Doorbal, like the defendants in each of the above-cited cases, was therefore entitled to a new trial. Thus, Doorbal's appellate counsel's omission to raise or discuss this error on direct appeal fell measurably below objective standards of reasonably effective assistance of counsel in a criminal appeal where the defendant faces death. Counsel's omission to do so was a serious deficiency that undermined confidence in the outcome of the entire proceeding.

But for appellate counsel's omission to raise or discuss this error on direct appeal, there remains a reasonable probability jurors would have rejected Schiller's testimony and acquitted Doorbal of the Schiller counts–which were also used as aggravating facts in imposing capital punishment.

CLAIM VII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE TRIAL COURT'S ERROR IN DENYING THE DEFENSE MOTIONS TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL FOR IMPERMISSIBLY DOUBLING AGGRAVATORS.

Though Doorbal's appellate counsel raised a loosely related issue that considering both the felony murder and pecuniary gain aggravators amounted to an impermissible doubling of aggravating factors used to imposed the death penalty), Doorbal had also moved the trial court to declare the pecuniary gain aggravator itself

unconstitutional, alleging the circumstances resulted in double consideration of the "during the course of a felony" aggravator. (R. 1371-78).

Doorbal's appellate Counsel did not fully and properly discuss the unconstitutionality of "during the course of a felony" aggravator on direct appeal.[5]

The trial court found as aggravating circumstances that Doorbal had committed the murder both: (1) for the purpose of pecuniary gain, and (2) during the course the commission of a felony-robbery.

When a homicide occurs during the course of a robbery, however, it is improper for the trial court to find as aggravating circumstances both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain. *See* Barnhill v. State, 834 So.2d 836, 851 (Fla. 2002) ("[W]hen a homicide occurs during the course of a robbery, the court cannot find both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain. Doubling of aggravating

[5] The trial court found 5 aggravators applicable to both murders: (1) prior violent felonies, including the contemporaneous murder of the other victim and the kidnaping, robbery and attempted murder of Schiller; (2) during the course of a kidnapping; (3) avoid arrest; (4) pecuniary gain; and (5) CCP. (R. 3462-72). The trial court also found the HAC aggravator applicable to the Furton murder. (R. 3468-71).

circumstances is improper where the circumstances refer to the 'same aspect' of the crime.").

This Court's holdings have been substantially identical in several other death penalty cases. The first of this particular line of cases was the decision in Provence v. State, 337 So.2d 783, 786 (Fla.1976).

Nearly thirty years later, in Chamberlain v. State, 881 So.2d 1087 (Fla. 2004), this Court again followed its established rule.

The pecuniary gain aggravating circumstance unlawfully expands the class of death eligible by repeating other aggravating factors as does its corresponding standard jury instruction. Further, because its instruction fails to inform the jury of the narrowing constructions on the circumstance made by the Supreme Court, the instruction improperly relieves the State of its burden of proving the elements of the circumstance. As such, the pecuniary gain aggravator and its corresponding jury instruction, as applied in Florida, violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 16, 17, 21, and 22 of the Florida Constitution.

This factor is straightforward, and has been strictly construed by the Florida Supreme Court. *See* Simmons v. State, 419 So.2d 316 (Fla. 1982). The Court has held that pecuniary motivation must be proven beyond a reasonable doubt and such

proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. The ease with which jurors and the courts can decide whether this factor applies does not cure and in fact heightens its unconstitutional expansion of the class of the death eligible by repeating other circumstances. In this case, the pecuniary gain circumstance doubles the robbery circumstance by referring to the same aspect of the defendant's case. *See* Provence.

Thus, the tripling calls for a sentence of death and violates the Eighth Amendment requirement that death sentencing procedures provide a meaningful basis for distinguishing the few cases in which death is appropriate from the many cases in which it is not. Furman v. Georgia, 408 U.S. 238, 313 (1972). "To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983).

The existence of several aggravating factors calling for a sentence of death based on the same conduct of the defendant thus violates the eighth amendment. *See* Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The standard jury instruction for this particular aggravating factor simply tracks the statute. Because it permits improper consideration of an improper aggravating circumstance, its use violates the cruel or unusual punishment clauses of the state and federal constitutions. Espinosa v. Florida, 112 S.Ct 2926 (1992). The reading of the pecuniary gain circumstance and the others listed above likewise violates the Eighth Amendment.

Consequently, an arbitrary and illegitimate application of this aggravating circumstance by juries is inevitable, in violation of the principles set out in Maynard and Espinosa. Further, by not informing the jury of the narrowing construction, the instruction unconstitutionally relieves the State of its burden of proving the integral element of the circumstance.

This Court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment or, at least, remand for resentencing.

Thus, the trial court in the present case erred in finding both commission for pecuniary gain and commission during the course of a robbery as aggravating factors, and this was an issue for direct appeal.

Doorbal's appellate counsel's omission to raise or discuss this error on direct appeal fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal case wherein a defendant faces death. But for

appellate counsel's omission to properly argue this issue, there remains a reasonable probability the outcome of the appeal would have been different, with a reversal and remand for new penalty phase proceedings.

CLAIM VIII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS TRIAL COURT ERROR IN DENYING PENALTY PHASE DEFENSE COUNSEL'S MOTIONS TO WITHDRAW.

Doorbal was denied the effective assistance of appellate counsel guaranteed by the Sixth Amendment when appointed appellate counsel failed to raise or discuss the trial court's erroneous refusal to allow penalty phase counsel to withdraw after counsel revealed that her secretary and Doorbal entered into a relationship causing multiple problems with the attorney-client relationship. Ms. Burke filed the Motion after she returned from maternity leave in the Doorbal case and leaving her staff to assist Doorbal. Ms. Burke, who had no previous death penalty training or experience, was at various times placed in the dubious position of filling in for Mr. Natale who was quite often not present during critical pre-trial hearings. The trial Court denied Ms. Burkes Motion to Withdraw, and she no longer practices law.

A criminal defendant is deprived of the Sixth Amendment right to counsel where: (i) defense counsel is faced with an actual conflict of interest, and (ii) that

conflict has "adversely affected" defense counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), *cert. denied*, 488 U.S. 958 (1988) (same). Doorbal's defense counsel was experiencing personal and professional difficulties which clearly interfered with her representation of Doorbal, creating a conflict of interest, and the trial court's refusal to allow her withdrawal should have been raised as error on direct appeal.

Appellate counsel's failure to raise or discuss this error on direct appeal constituted a serious deficiency measurably below objective standards of reasonably effective representation of a defendant in a capital case.

But for appellate counsel's failure to raise or discuss on direct appeal the trial court's refusal to allow defense counsel to withdraw, there remains a reasonable probability the case would have been reversed and remanded on direct criminal appeal as Doorbal had a constitutional right to adequate counsel. This Claim is further evidenced by the fact that neither Ms. Burke nor Mr. Natale nor any of their staff, assistants or investigators ever secured the most basic of documents and records (school and medical records) that should have been entered into evidence during the penalty phase of Mr. Doorbal's trial.

CLAIM IX

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN REFUSING TO APPROVE FUNDS FOR DEFENSE EXPERTS.

In addition to each of the foregoing omissions, Doorbal's appellate counsel also failed to raise or discuss on direct appeal the trial court's denial of funds needed to compensate the defense psychiatric expert.

Though defense counsel had moved for the authorization of funds with which to compensate defense experts as early as January 1998 before Doorbal's trial, at a hearing in October 1998, Doorbal's defense counsel was still attempting to have the funds authorized for payment to the still-uncompensated defense experts.

The trial court, however, flatly denied the authorization of a large portion of funds for a psychiatric expert needed for Doorbal's defense. (T. 14436-14443). Doorbal's appellate counsel, however, failed to raise or discuss this matter on direct appeal. The issue of appellate counsel's ineffectiveness is appropriately raised in a petition for writ of habeas corpus. *See* Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). A criminal defendant is entitled to expert psychiatric assistance when his or her mental state becomes relevant to the proceedings. *See* Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985).

As noted by the United States Supreme Court in Ake v. Oklahoma, when a defendant demonstrates to the trial judge that his mental condition is at issue, the defendant must have access to a mental health expert who will conduct an appropriate examination and assist in evaluating, preparing, and presenting the defendant's defense. This is especially true in death cases, where "the consequence of error is so great." Id. at 84, 105 S.Ct. at 1097.

When an expert is appointed and serves as a defense expert, moreover, a criminal defendant has an interest in the expert's compensation. An uncompensated expert labors under something of a financial conflict likely to sour the defense's relationship with its expert.

Doorbal's appellate counsel's omission to raise or discuss this error on direct criminal appeal fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal case wherein the defendant faces death. Appellate counsel failure to do so denied Doorbal the effective assistance of counsel on direct criminal appeal guaranteed both by the Sixth Amendment to the Constitution of United States of America and by Article I, Section 12 of the Constitution of the State of Florida.

CLAIM X

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN OVERRULING THE DEFENSE OBJECTIONS TO THE MEDICAL EXAMINERS' TESTIMONY. THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF INFLAMMATORY PHOTOGRAPHS WHOSE POTENTIAL FOR UNFAIR PREJUDICE OUTWEIGHED ANY PROBATIVE VALUE.

At trial, defense counsel objected to the introduction of photographs of skeletal remains with attached remnants of flesh on the grounds that they were unduly prejudicial and lacked probative value. The substance of the defense position was that they were gruesome, inflammatory and served no purpose in explaining the medical examiner's conclusions. (T. 12242-12243, 12248).

The trial court overruled the defense's objection to the admission of the photographs on the grounds that the photographs' probative value outweighed their potential for unfair prejudice. (T. 12250). Seven photographs were then moved into evidence. (T. 12253-12254). The defense later objected, also, to the cumulative introduction of photographs. (T. 12281-12282).

The defense objected to the medical examiner's opinion that the pictures were necessary as follows:

> In my opinion, anything in the [carousel] is what I need to show my testimony. It shows that the limbs are cut off

> and that's what the bodies have. It shows the decomposition –

(T. 12285).

The trial court then interrupted the medical examiner and, rather than addressing Doorbal's original objection that the photographs were unduly prejudicial and lacked probative value, the trial court discussed whether the photos were duplicative. (T. 12285-12286).

The medical examiner's comment that the "[p]urpose is dismemberment here and so the general area of the body so such that's coming in" (T. 12291) lacked any coherent rationale for admitting these pictures into evidence and placing them before the jury which was a to render a verdict in this case that include counts for the desecration of a dead body. Nor were the photos necessary to identify the victims.

Though Doorbal objected to the admission of State's Photographic Exhibit 49G (T. 12292), the trial court admitted that photograph into evidence as "highly probative" since it showed "the decomposition process over night in a rapid fashion." (T. 12296).

The trial court admitted the contested photographs into evidence subject to Doorbal's previous objections, as they were published before the jury in the form of a carousel slide presentation. (T. 12318, *et seq.*).

This Court has reversed a capital murder conviction based on admission of eight photographs of a gruesome, decomposed body. Czubak v. State, 570 So.2d 925, 928-29 (Fla.1990) (Photos of victim showing her "severely decomposed and discolored body" parts which were "apparently eaten away by two small dogs" were inadmissible under section 90.403, as "the relevance of the photographs is outweighed by their shocking and inflammatory nature," where they did not establish the victim's identity because the decomposed body was unrecognizable, the body was identified by other methods, the photos did not reveal any fatal wounds and were not probative of the cause of death). *See also* Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990) (second-degree murder conviction reversed, based on admission of photo showing internal part of victim's head after scalp rolled away, leaving flesh under hair and showing bruises and bleeding); Young v. State, 234 So.2d 341, 348 (Fla. 1970) (murder conviction reversed when admitted photos showed decomposed torso of victim, though relevant to identity of victim); Dyken v. State, 89 So.2d 866 (Fla. 1956) (en banc) (reversal where photo of gunshot wound in head was admitted, as defendant conceded wound's location and it was described or shown by other evidence).

It is, in fact, unfairly prejudicial to show a murder victim's body where doing so is unduly inflammatory. Henry v. State, 574 So.2d 73 (Fla. 1991) ("[I]t is likely

that the photograph [of the victim's body] alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.").

In recent years, this Court has requested gruesome photographs be "carefully scrutinized" before admission to avoid the potential prejudicial inflammatory impact, particularly in death cases. Marshall v. State, 604 So.2d 799, 804 (Fla. 1992).

At bar, the extremely inflammatory photographs of the victims' remains had little or no relevance. They did not establish the victims' identities because the decomposed bodies were wholly unrecognizable. The bodies were also fully identified though other methods. The photographs did not reveal any fatal wounds and were not probative of the cause of death. The medical examiner determined the cause of death by other means. The photographs did not assist the medical examiner in explaining the cause of death. The gory photographs of skeletal remains were not corroborative of other relevant evidence.

Though Doorbal's defense counsel had objected to the introduction of the photographs and the medical examiners' testimony based thereon at the trial court level, Doorbal's appellate counsel wholly failed to raise or discuss these matters on direct criminal appeal.

Thus, Doorbal's appellate counsel's omission to raise or discuss these errors on direct criminal appeal of Doorbal's Judgments and Sentences fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal prosecution wherein the defendant faced death.

But for appointed appellate counsel's failure to raise or discuss these serious matters on direct appeal, there remains a reasonable probability the outcome of the proceeding would have been different as there remains a reasonable probability that the Court would have entertained Doorbal's arguments, applied the cited authorities and reversed and remanded for a full and fair new jury trial at which the inflammatory photographs are excluded.

CLAIM XI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN DENYING DEFENSE MOTIONS TO SUPPRESS EVIDENCE.

At the hearing on the motion to suppress Doorbal's statements, defense counsel, Mr. Natale, argued that Miranda warnings had not been given properly and had not been knowingly waived. (T. 2286, 2288). The State called only one witness, former Miami-Dade Detective Nicholas Fabregas (T. 2290, *et seq.*), who testified that he was assigned to approach Doorbal at his place of residence simultaneously with the execution of the search warrant at that location, to "obtain

Doorbal's cooperation and conduct an interview." (T. 2293). "It appeared he had just woken up or woken up a few minutes earlier." (T. 2294). Detective Fabregas and Hillman took Doorbal to an interrogation room in the homicide office and began questioning him without Miranda warnings. (T. 2296-2297). Fabregas stated that he gave Doorbal Miranda warnings. (T. 2298-2299). According to Fabregas, Doorbal, confronted with evidence found at his residence, "told me that he knew he was going to jail for the rest of his life and didn't want to speak with me any longer." (T. 2310). According to Fabregas, Doorbal then terminated the interview. (T. 2310).

Though Doorbal had been picked up from his apartment for questioning, the trial court prohibited the defense from asking Fabregas how he had known the apartment was Doorbal's, characterizing such inquiry as "collateral impeachment." (T. 2315). The trial court did not, however, explain how the circumstances under which Doorbal was taken from his private place of residence to be interrogated in police custody was a collateral issue.

The police interrogation of Doorbal was not recorded and at no point did Fabregas attempt to record Doorbal's alleged statements. (T. 2319). According to Fabregas, it was not until after Doorbal had made the alleged incriminating

statements that Doorbal suddenly stated he did not want to speak with police any more. (T. 2321). The State put on no other witnesses.

Though the State never introduced evidence beyond a rights waiver card to carry its burden of showing any waiver of Doorbal's Miranda rights was voluntary, and though the trial court prohibited the defense from questioning the State's sole witness about how Doorbal was pinpointed for apprehension, the trial court denied Doorbal's Motion to Suppress. (T. 2325). Doorbal's appellate counsel never raised or discussed on appeal the trial court's refusal to suppress Doorbal's statements.

"The State," however, "bears the burden of proving that the waiver of the Miranda rights was knowing, intelligent and voluntary." Ramirez v. State, 739 So.2d 568, 575 (Fla.1999). Likewise, the State has the burden to show, by a preponderance of the evidence, that a defendant's oral confession was freely and voluntarily made. *See* Brewer v. State, 386 So.2d 232, 236 (Fla.1980). "[T]he ultimate issue of voluntariness is a legal rather than factual question." Ramirez, 739 So.2d at 575. This Court's standard of review is, therefore, *de novo*.

In the present case, the State wholly failed to carry its burden of showing that the Doorbal's oral statements were freely and voluntarily made. Though Doorbal's trial counsel had moved to suppress Doorbal's statements and though trial counsel preserved this issue for direct appeal, Doorbal's appellate counsel failed to raise or

discuss the trial court's failure to suppress Doorbal' statements in the process of prosecuting Doorbal's direct criminal capital appeal.

The foregoing authorities show Doorbal's counsel's omission to raise or discuss these errors on direct appeal fell measurably below objective standards of reasonably effective assistance of appellate counsel in a criminal case wherein the defendant faces death. But for appellate counsel's failure to raise or discuss these matters, there is a reasonable probability the outcome of the appeal would have been different as there remains a reasonable probability this Court would have entertained Doorbal's issues, applied the cited authorities and reversed and remanded for a new trial at which the illegally obtained statements are excluded.

Appellate counsel's failure in each of the foregoing regards constitutes ineffective assistance of appellate counsel under the Strickland standard. Strickland v. Washington, 466 U.S. 668 (1984); Wilson v. Wainwright, 474 So 2d 1162, 1163 (Fla. 1985); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000); Suarez v. Dugger, 527 So. 2d 190 (Fla. 1998); Randolph v. Florida, 853 So. 2d 1051 (Fla. 2003).

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and those set forth in the accompanying Initial Brief, a new trial and/or sentencing is warranted.

Respectfully submitted,

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Fla. Bar No. 33121

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) AAG Jaggard, (2) ASA Levine, (3) the Honorable David H. Young, (4) Defendant, Noel Doorbal, by United States Mail, this 24th day of July, 2006.

_____
Melodee Smith
Fla. Bar No. 33121

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

_____
Melodee Smith
Fla. Bar No. 33121